Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JOAN ATKINS PORRO and ALFRED A. PORRO, JR.
PETITIONER(S)

vs.

UNITED STATES OF AMERICA – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI

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December 8, 2003

QUESTION(S) PRESENTED

In Light of *Miller-El v. Cockrell,* 123 S. Ct. 1029 (2003):

1. Whether "an abandonment or abduction of judicial power" results when a court denial of a Certificate of Appealability is based solely on the recurring practice of verbatim reproduction of the Government Answer, merely substituting the court's signature at the end, including a feigned sentence and ignoring its own res judicata unpublished adjudication of ineffective counsel.

2. Whether a "debatable among jurist of reason" claim of a denial of a constitutional right is achieved, per se, when it is undisputed that:

   a. a conflicting res judicata unpublished judgment deemed the assistance of counsel as substandard resulting in an adjudication of a waiver of substantial constitutional guarantees or

   b. there is a severe conflict within and among the Circuits respecting the mandate of this Court in *Cleveland v. United States,* 531 U.S. 12 (2000) admonishing the criminalization of intrastate conduct which is traditionally lawful under State law and without a proper federal

c. nexus, similarly before this Court in *Sabri v. United States*, 03-44, cert. granted Oct. 2003

d. there is an intractable divide between the Courts of Appeal respecting this Court's intended application of *Ring v. Arizona*, 536 U.S. 584 (2002) as is before the Court in *Blakely v. Washington*, 02-1632, cert. granted Oct. 2003.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is unpublished App 1a-2a
The opinion of the United States District Court appears at Appendix B and C to the petition and is unpublished App 3a-26a, 27a-28a

JURISDICTION

The date on which the United States Court of Appeals decided this case was June 24, 2003. App 1a-2a
A petition for rehearing by the United States Court of Appeals was filed on July 7, 2003 it was denied on September 30, 2003. Appendix E App 31a-32a
The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury …; nor be deprived of life, liberty, or property, without due process of law.

U.S. Const. amend. V.
The Sixth Amendment to the United States Constitution provides, in pertinent part, that:

> In all criminal prosecutions, the accused shall enjoy the right to a *** public trial, by an impartial jury of the *** district wherein the crime shall have been committed, *** and to be informed of the nature and cause of the accusation; …and to have the Assistance of Counsel for his defense."

U.S. Const. amend. VI.

STATEMENT OF THE CASE

The vital issues presented by this case emerge in light of *Miller-El v. Cockrell,* 123 S. Ct. 1029 (2003). A panel of the Third Circuit denied a Certificate of Appealability (COA) on constitutional violations raised. The denial, was contrary to a prior unpublished res judicata ruling in this case. It also was in conflict with decisions of other panels of this Third Circuit, other Circuits, and this Court on two other constitutional infringements presented.

This outgrowth resulted from a recurring departure in judicial proceedings involving unpublished opinions. It is addressed in the first issue presented. The panel denial of the COA was without reason except: "For essentially the same reasons given by the District Court***." App. 1a-2a. The District Court "Opinion", App 3a-26a, to which full "deference" was given, is word for word, coma for coma, error for error, a total verbatim reproduction of the Government Answer. This practice is undisputed. Basically, only the introduction and signature page is altered to present the appearance of a judicial product. Caseload is the articulated genesis of this custom. See FN. 4 infra, at p. 14-15.

The petitioners stress the significance of sanctioning this growing lower court departure from accepted proceeding by demonstrating that such cloning, requires the exercise of this Court's supervisory power. Here the practice resulted in the adoption of the Government feigning of an untrue sentence for one of the petitioners. To accommodate its argument that the sentence (admittedly, greatly aggravated by the Judge alone) did not exceed the statutory maximum of five years, its Answer misrepresented that petitioner's sentence did not exceed five years. In fact the sentence inflicted by the same District Court Judge was 70 months. Yet this robotic practice resulted in the lower court holding:

> "Here, the loss did not result in a sentence beyond the maximum statutory penalty. Each of the defendants was sentenced within the five-year statutory maximum provided for in the statute. As such, this claim fails." App. 18a, a verbatim error from p14, Answer and Memorandum of Law of United States, dated October 5, 2001

Petitioners further assert that this prosecutional mirroring practice, unsupervised, permits the District Courts to ignore its prior res judicata decision. In the law of this very case this same court deemed both petitioners 4th and 6th Amendment constitutional guarantees waived by a judicial finding of substandard conduct of

defense counsel's conduct. Though raised by the Joint Petitioners below in the habeus corpus context it was ignored. The Government Answer ignored the prior ruling; accordingly the mannequin judicial opinion ignored it. As to this first issue, the Petitioners urge that the warning against "an abandonment or abduction of judicial power" proclaimed by this Court in *Miller-El v. Cockrell* requires this Court to settle these vital issues.

The second issue presented addresses the standard of "debatable among jurist of reason" with respect to issues of effective assistance of counsel and fair jury trial guarantees of the 6th Amendment, and federal criminalizing of conduct lawful under State law. The lower court denied the COA on the merits, i.e., "devoid of merit." App. 27a-28a. The appeals court in adopting, by proxy, the government answer on the merits decided the important Constitutional questions in a way that conflicts with this Court's decision in *Miller-El v. Cockrell*. In *Miller-El* this Court directed that appeals courts should not deny a COA where the constitutional right claimed is "debatable among jurist of reason." This Court's directive was to limit examination to a threshold inquiry rather than on the merits of the Petitioners claims. The res judicata decision is

submitted as a per se satisfaction that jurist of reason could and did disagree with the District Court resolution.

Petitioners join in requesting that this Court resolve the conflict of the Circuits with *Cleveland v. United States* respecting the important determination of "federal-state balance" in conjunction with the federal nexus conflict also before this Court in *Sabri v. United States*, 03-44, Oct. 2003. Lastly, Petitioners urge that the existence of intractable divided circuit decisions on the 6th Amendment violation declared by this Court in *Ring v. Arizona* per se required the issuance of the COA. This same is similarly before this Court in *Blakely v. Washington,* 02-1632, Oct. 2003.

Factual Background

Petitioners are husband and wife. Both practiced law in New Jersey, for 40 years and 20 years respectively. Alfred Porro is a respected specialist in coastal zone law.[1] Joan Porro focused on a general practice.

Alfred Porro became embroiled in contentious litigation involving the United States Attorney's Office for the District of New

[1] This Court has cited Mr. Porro's legal writing. *See Phillips Petroleum Company v. Mississippi & Saga Petroleum U.S., Inc.*, 484 U.S. 469, 493 (1987) (O'Connor, J. dissenting) (quoting Porro & Teleky, *Marshland Tidal Dilemma: A Tidal Phenomenon,* 3 Seton Hall L. Rev. 323, 325-26 (1972).

Jersey through his representation of a Congressman. The Third Circuit reversed a district court's dismissal of an action Porro had brought on behalf of the Congressman alleging that the United States Attorney was engaged in a systematic effort of grand jury leaks. See *Helstoski v. Goldstein*, 552 F.2d 564, 565-66 (3d Cir. 1977)

(1) Res Judicata; Ineffective Counsel

An I.R.S. criminal investigation was ongoing for years after. A grand jury was ultimately empanelled, search warrants executed, and the indictment in this case issued. Petitioners retained counsel, who communicated with the prosecutional team. He prepared for trial: the defense, legal research, trial strategy and plan. He assembled, compiled and organized all documentary and testimonial evidence relative to his trial strategy plan. All of his defense camp files were seized from the law offices of the Petitioners on January 4, 1995. Defense counsel then handled the attempted, but unsuccessful, retrieval of all these defense strategy files. He also represented the Petitioners respecting a constitutional challenge to the seizure, I.R.S. possession and prosecutional use of the defense files. On August 2, 1996, he sought judicial intervention. The government amended its indictment using the files, prepared for trial

and obtained a District Court order prohibiting Petitioners from contacting key defense witnesses listed in the seized defense strategy plan. The District Court on March 4, 1998 and Third Circuit Court on August 22, 2000, (unpublished) both deemed the defense delay in seeking judicial intervention and the manner of handling the retrieval as misconduct and a waiver of Petitioners rights. Defense counsel became seriously ill. Petitioners, pro se, with his support, attempted to execute his defense trial plan. The prosecution utilized the defense files, documents and witnesses extensively in the trial of the case. A defense debacle occurred.

In this §2255 proceeding, at issue now, defense counsel submitted a Certification setting forth his representation of Petitioners, his ineffectiveness and a very detailed chart, setting forth the extreme prejudice to Petitioners. At the sentencing Joan Porro had been represented by defense counsel. The sentencing process and ultimate aggravated incarceration terms, supervisory release and restitution also reached a series of highly prejudicial departures from the standard of defense assistance. This too was verified in defense counsel's §2255 certification.

2. Cleveland and Ring Issues

(a) The Indictment: Counts 1-3 charged Mail Fraud, 18, U.S.C. 1341; the sole scheme charged was one of non-disclosure; there was no theft or loss charged.[2] Specifically described were two intra-state trust investments. Possession and power of transfer of funds, title of which was vested in Joan Atkins Porro, as Trustee were in accord with New Jersey law, one for $176,000 in 1989 and one for $100,000 in 1991. Both transfers were invested, as convertible options for the trust, in an approved realty project. Both yielded substantial paid earnings and return of principal to the trust; no loss was incurred nor charged. Both investments were proper under the law governing trustees under the law of the State of New Jersey.[3] Count 4 charged money laundering regarding the same funds charged in Counts 1-3, 18 U.S.C. 1957(a). This Count was

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[2] The indictment was solely a non-disclosure charge; it charged that the first "transfer was without prior notice to trust beneficiaries" and "without disclosing the 'defendants' interest in this limited partnership" to which the transfer was made, par. 4; "failed to disclose that she and her husband had a financial interest in" that same limited partnership par.5(a). It charged the second transfer was made "wrongfully and in violation of her duty as a trustee, failed to disclose to the Trust beneficiaries the transfer of these trust funds to financial ventures in which the Porros held a personal financial interest", par. 8; further charged that the defendant trustee "failed to disclose the transfer of trust funds", par. 9. (emphasis added) It charged three February mailings, 1992, 1993 & 1994 in which the trust data was forwarded (for the preparation of the trust's income tax returns for those specified years). par. 11.

[3] Clapp, Alfred, Trusts Created by Will, New Jersey Practice, Wills and Admin., 3rd Ed. (1962); *Fidelity Union Trust Co. v. Power* 18 N.J. Super. 578 (ch. 1952). Terms of Will, as here, dictates Trustee obtaining possession, title, power of

ultimately dismissed on direct appeal after verdict. Count 5 charged a conspiracy to obstruct justice relative to Counts 1-3, 18 U.S.C. 371. Counts 6-14 charged Alfred A. Porro with various alleged false statements to a bank including property valuations. 18 U.S.C. 1014. All loans in question had long been satisfied; all security mortgages and personal guarantees were discharged and released in satisfaction thereof. Thus, **no loss** was charged. Count 15 charged Joan Atkins Porro with tax evasion for maintaining a nominee bank account. 26 U.S.C. 7201. In view of the fact that the tax at issue was fully paid many years prior to this indictment from this very nominee account **no loss** was charged. Counts 16-18 charged both Porros with false subscription to personal income tax returns for 1992, 1993 and 1994. 26 U.S.C. 7206(1). **No loss** was charged. Count 19 charged Joan Atkins Porro with a false subscription on the 1990 partnership return. 26 U.S.C. 7206(1). Again **no loss** was charged.

(b) **No Loss Finding By Jury**: Over Petitioners objection, at trial, the instructions to the petit jury prohibited this jury from making any finding respecting loss on any of the counts. The jury instructions declared loss was not a part of any of the charges against

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transfer without disclosure, *La Fortune v. Comm's of Internal Revenue* 263 F. 2d

Petitioners. The requested jury instructions of Petitioners relative to the title, possession, power of transfer and lack of duty to disclose under the written terms of the trust and New Jersey law were also denied. Over objection, the jury was advised that the federal mail fraud statute superceded the Will and State law. The jury verdict on each count was void of any finding of loss or any violation of State law governing the investments.

(c) Sentencing: The sentence imposed was based upon factual findings made by the judge alone and not the jury. The crimes charged and found by the jury carried a maximum sentencing offence level 6 under the mandatory Federal Sentencing Guidelines. Fraud U.S.S.G. §2F.1. and Tax 2T1.1. The judge increased the level 6 basis, to a level 27 in the case of Alfred A. Porro and a level 25 in the case of Joan Atkins Porro, primarily on the basis of "intended" loss. In the case of Joan Atkins Porro the aggravated facts generated a 350% increase in guideline level and an 850% increase in sentence from 6 months to 57 months. In the case of Alfred A. Porro a 350% increase in guideline level and 1070% increase in sentence from 6 months to 70 months.

186, 192 (10th Cir. 1958).

REASONS FOR GRANTING THE PETITION

I. The Third Circuit's C.O.A. Denial Conflicts With This Court's Decision in *Miller-El vs. Cockrell* 123 S. Ct. 1029 (2003) In That It is Rooted In A Recurring Practice That Is An "Abandonment or Abduction of Judicial Power."

The holding of the Third Circuit directly conflicts with the decision of this Court in *Miller–El v. Cockrell,* 154 L.Ed. 2nd 931 (2003). Two important questions are present in a way that creates the conflict. Relevant to this first issue, the COA denial was, as is customary, based solely on deference, i.e., "for the same reasons given by the District Court" on the merits. App. 1a-2a. In a "dismissive and strained" *id.* 154 L.Ed. 2nd at 954 avoidance it characterized the mannequin opinion below as one that "relied heavily on the Government Answer." App. 1a-2a. By doing so it "sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a). The appeals panel next placed upon an applicant for a COA an additional burden of proof contrary to *Miller-El.* It required the Petitioner to show that the cloned opinion "was improper." App. 1a-2a. It is urged to be an "abandonment or abduction of judicial power" under *Miller-El v. Cockrell, id.* 154 L.Ed at 952.

In *Miller-El* this Supreme Court clarified the standards for issuing a C.O.A. under 28 U.S.C. §2254. The essence of the holding was a direction to appeals courts not to preclude remedy by confusing the appealability issue with that of a lower court's decision on the merits of the case, as here. In *Miller-El* an African American was convicted. He, though in the context of jury selection, like this Petitioner claimed he was denied a fair trial. The State Court denied his appeal accepting the government answer. His application for habeus relief, as here, was denied by the federal lower courts. This Court held that he should be granted a COA in view of the lack of "full consideration" *id.* 154 L.Ed. at 953 of issues "debatable among jurist of reason" *id.* at 950, 952.

Relevant to this first point this Court stated "deference does not imply abandonment or abdication of judicial power. Deference does not by definition preclude relief." *id*, 154 L.Ed. at 952. Petitioners urge that the practice of cloning, as here, should be deemed a preclusion of relief by "abandonment or abdication." The very nature of "verbatim" is exactness of reproduction, without independence of thought, reason, or truth. In a judicial context total prosecution verbatimism quenches any expectation or public image

of judicial fairness. It is a sever departure from acceptable and usual judicial obligation in performing its independent duty calling for an exercise of this Court's supervisory power. If this had been a civil matter such wholesale adoptions are per se suspect. e.g. *Sealy, Inc. v. Easy Living, Inc.* 743 F.2d 1378, 1384 (3rd Cir. 1984). How much more then should this Court intervene in a criminal matter?

The danger of this practice is objectively manifested here in the lower courts adopting an untrue sentence, lack of consciousness of its own prior ruling regarding defense counsel conduct and blindly ignoring the rationale of one applicable High Court case and failing to address another. It is urged that, here, as in *Miller-El* this Court "have no difficulty concluding that a COA should be issued" *id.* 154 L.Ed. 2nd at 952-953. Here too, the lower courts "accepted without question" the prosecutions answer and exercised no independent "full consideration." *id.* at 953

II. The "Debatable Among Jurist of Reason" Standard of *Miller-El v. Cockrell* Should Be Deemed Achieved When The Record Is Undisputed That: a) A Conflicting Unpublished Res Judicata Judgment Deemed The Actions of Defense Counsel Substandard Resulting In An Adjudication of a Waiver Of Defendants Constitutional Guarantees, or b) A Conflict Exists Between The Panels Within Outside The Third Circuit Respecting The Mandates of This Court In *Cleveland v. United States and Ring v. Arizona*

A. Res Judicata – Ineffective Assistance of Counsel

The *Miller-el v. Cockrell* standard of showing a claim of a denial of constitutional rights is at issue. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *id.* 154 L.Ed 2nd at 953. The Third Circuit denial of a COA ignored an important question of law that has not been, but should be settled by this Court. Does a conflicting unpublished res judicata judgment or rule of the case satisfy this test of "debatability"? Should it matter that they were unpublished decisions? The recurring cloning practice exhibited here is very prevalent in the Circuits. It's vehicle ("not for publication") is now in grotesque public display as "Justice In The Dark", "Quickie Jurisprudence", "No Accountability", "Streamlining", "Two Level System," "Quiet Justice".[4] It is a practice that cries out for an

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[4] See Change Proposed For Federal Rules of Criminal, Appellate Procedure, respecting "not for publication opinions". 73 Crim. Law. Rep., No 21, p. 547 (August 27, 2003); also see recent reports and cases challenging this double standard in McMenanin, Brigid. Justice in the Dark: Federal Appeals Judges Say They Are So Overworked That They Have to Dispense Quickie Jurisprudence Meaning No Accountability, Forbes, Oct. 30, 2000; Glaaberson, William, Legal Caseloads Limits Streamlining Effect by Federal Judges Creates Controversy, The New York Times, Oct. 12, 2000. Caseloads Force Two Level System For Appeals Courts, The New York Times, March 14, 1999; VanDerVelade, Robert, Auburn University Study, Quiet Justice: Unreported Decisions of the United States Court of Appeals; *Anastasoff v. United States*, 2000 WL 118 2813 (8th Cir. 8/20/00 and *United States v. Rivera-Sanchez*, 99-10243 (9th Cir. 2000).

exercise of this Court's supervisory power. This case exemplifies the proportions of it's departure from the vocation of this court and the public erosion in judicial credibility.

On March 4, 1998 the District Court adjudicated substandard conduct in counsel's delay in seeking judicial intervention respecting a recognized illegal seizure of defense files. Said conduct was found by "the passage of time and lack of proper response to government invitations to review documents." Unpublished, 3/4/98 Op. at p. 6-7. A fatal waiver of all defense rights, including 4th and 6th Amendment guarantees was ruled. Defense counsel became seriously ill. Petitioners proceeded to trial with defense counsel's plan representing themselves. After a trial debacle for the defense, the Third Circuit, on a direct appeal, on October 22, 2000 in an unpublished opinion affirmed the District Court holding on "Waiver of Fourth and Sixth Amendment Rights." It ruled the defense "at every stage" of attempted retrieval of illegally seized documents "either refused to cooperate or engaged in dilatory practices that needlessly delayed the resolution of their privilege claims." It held defense conduct "failed", "refused *** to assist", "postponed" and "failed to demonstrate." *id* unpublished 10/22/02 Op. at p. 25.

The Petitioners, in the context of this habeus corpus proceeding urged that the prior rulings supported their claim of ineffective counsel. Defense counsel provided a supporting certification of his representation, advise and a separate detailed chronology of his actions respecting the attempted retrieval of the illegally seized defense strategy files. He verified his erroneous advise that the burden was on the prosecution to deposit the illegally seized files with the Court. He admitted his unawareness of the new practice of a prosecution "Chinese Wall". He itemized in chart form the prejudice suffered by these Petitioners resulting from his being their counsel during this critical pretrial preparation stage.

The Government Answer strategically totally ignored the prior Court rulings and supportive certification and chart of defense counsel. It attempted an "end run" to outflank the record by totally ignoring it. The Answer presented a diversionary argument of self-representation at trial. The District Court cloned the "x-ing out" of the critical pre-trial representation of defense counsel and prior Court rulings in its "Opinion" App. 19a-23a. The appeals court adopted it. App. 1a-2a. This trilogy ignoring the unpublished res judicata adjudication now frames the issue before this Court. cF.

conflict in *United States v. Curtis*, 336 F.3d 666 (8th Cir. 2003) (rule of case in an unpublished opinion is binding).

On this point Petitioners request the granting of Certification on the merits. The Third Circuit decision is in conflict with the relevant decisions of this Court and other Circuits which have deemed lesser failures of defense counsel as ineffective. The Supreme Court of the United States in *Glover v. United States* 121 S. Ct. 696 (2000) reinforced that the defective performance of counsel by failure to act (there failure to submit papers or offer oral arguments) fell below a reasonable standard of competence. The performance failures of counsel here, over a long period, and resulting prejudice are tremendous compared to the one time failure and prejudice in *Glover*. Also see *Gideon v. Wienwright*, 372 U.S. 799 (1963) and c.F. *Roe v. Flores-Orega*, 120 S. Ct. 1029 (2000) (mere failure to file notice of appeal is per se a 6th Amendment violation).

The issue of law that has not been decided, but should be, settled by this Court is whether the conduct adjudicated as substandard on direct appeal, becomes res judicata in a §2255 ineffective counsel context when it involves the same parties, same

facts, same case. On this issue, the Third Circuit is in conflict with other Circuits. See *Wims v. United States*, No. 92-1624, 1992 U.S. App. Lexis 33464 (7th Cir. 1992), Wims involved a §2255 petitioner requesting relief based on ineffective counsel failures. He asserted that the issue of substandard conduct was per se established by a ruling of the same Circuit Court in another case involving the same issue raised by a co-conspirator. A per se ineffective counsel claim was affirmed. Other Circuits have found per se prejudice where ineffective counsel resulted in waiver of lesser rights. See *Ellis v. United States,* 313 F.3d 636 (1st Cir. 2002); *United States v. Dominguiz Benitz*, 310 F.3d 1221 (9th Cir. 2002) (failure to advise that certain conduct can result in a waiver of rights is a per se violation of substantial rights).

Here Petitioners request this Court declare a denial of the Petitioners 6th Amendment constitutional right of effective assistance of counsel.

B. Conflict Within and Among The Circuits Respecting Two Supreme Court of The United States Decisions

1. *Cleveland v. United States*, 531 U.S. 12 (2000) Wheedled.

Petitioners urge that this Petition should be granted, in light of *Cleveland v. United States*, to resolve the conflict in the Circuits regarding the extension of federal jurisdiction by criminalizing intra state "conduct traditionally regulated by state and local authorization" id *Cleveland* expressly prohibited use of the Mail Fraud statute for "sweeping expansion of federal criminal jurisdiction in absence of clear statement of Congress". id. *Cleveland* addresses, as does this case, the important issue of "federal state balance". id. Petitioners urge the importance of the resolution of the Mail Fraud statute conflict in a way that is consistent with the settling of the related conflict in the Circuits respecting the need for a federal nexus under 18 U.S.C. §666. This Court recently granted a Writ of Certiorari in *Sabri v. United States*, 03-44, Oct. 2003 in view of the collision of the Circuits respecting the role, extent and nature of the conviction between offence conduct and federal connection. In settling the split in *Sabri*, this case presents an ideal setting to settle the parallel conflict with this Court's decision in *Cleveland* respecting the still reoccurring issue of fundamental intrusion on traditional state jurisdiction via the Mail Fraud statute. The timing is particularly important to decide the

prevalent open Mail Fraud conflict. The case present parallel reasons for granting the Petitions.

In the case at bar the government in their Answer and the "Opinion" App. 3a. do not dispute the legality of the 1986 Trustee Petitioners "obtaining" of title, possession and powers of transfers under State law. Nor do they dispute that under the trust agreement here, not only was non-disclosure legal, but under New Jersey law the trust creator desired transfers to be without disclosure. They attempted to constrain the *Cleveland* mandate to the definition of the word "property". Though, the Justices did define property and declare licenses as not being property, any attempt to strangle *Cleveland* there is an abomination of the Supreme Court's apparent serious mandate of terminating the sweeping expansion of federal criminal jurisdiction. In parroting the government verbatim the District and Circuit Court crawfished from *Cleveland*. The end result was to "wheedle" *Cleveland* into obscurity in the Third Circuit. Yet, another panel in the Third Circuit gave full respect to the rationale of *Cleveland*. In the published case of *United States v. Murphy* 323 F. 3d 102, 111 (3rd Cir. 200) the Chief Judge cited *Cleveland* for focus on the intent of Congress "to restore the mail

fraud jurisprudence". In this Third Circuit the published opinions are contra to this unpublished "Opinion" in this case. Most apparent is the Third Circuit published case cited extensively in *Sabri*, i.e. United *States v. Zwick*, 199 F. 3d 673 (3rd Cir. 1999) (strict statutory construction regarding the link between conduct and federal jurisdiction); also see other conflicting published opinions *United States v. Michael* 180 F.2d 55, 57 (3rd Cir. 1950 (prohibiting misleading juries into considering professional misconduct as criminal guilt) and *Villaneuva v. Brown* 103 F. 3d 1128 (3rd Cir. 1997) (duty to disclose is a matter of law).

Petitioners also point out the conflict of this Third Circuit panel decision with other circuits respecting constraining the federal mail fraud statute requiring a strict construction that the object of the fraud to "be property in the hands of the victim." *United States v. Peters* 310 F. 3d 709 (11th Cir. 2002). Here, under New Jersey law the property, title, and power of transfer was legally "in the hands" of the Petitioner. Further, confusion in the circuits exist respecting the criminalizing of alleged unethical conduct. e.g. *United States v. Holzer* 816 F. 2d 304, 309 (7th Cir. 1987); *United States v. Brown* 79 F. 3d 1550 (11th Cir. 1996) reversing federal conviction finding

"congress has not yet criminalized all sharp conduct, manipulative acts or unethical transactions". *United States v. Goodman* 984 F. 2d 235 (8th Cir. 1993); cF conflicting expansion view in *United States v. Bronston* 658 F.2d 920, 927 (2nd Cir. 1981) cert. denied, 456 U.S. 915 (1982) and criticism in *United States v. Bloom* 149 F. 3d 649, 656 (7th Cir. 1998) and effort to restore the federal nexus element in *United States v. Perrota* 313 F. 3d 33 (2nd Cir. 2002). A true state of confusion and conflict.

Cleveland v. United States was a major step toward clarification and restoration of constitutional "federal state balance" requiring strict construction of express parameters of Congress. The panel decision in this case wheedled the rationale and mandate of this Court. This petition is requested to be granted to permit the Court to settle this important federal issue consistent with it's determination of the *Sabri* case. At the very least a C.O.A. should be issued. There is a showing of a constitutional denial "debatable among jurist of record".

2. *Ring v. Arizona*, 536 U.S. 584 (2002): Conflict Presently Before This Court:

This Court on October 20, 2003 granted review in *Blakely v. Washington,* 02-1632. The important federal question in *Blakely* in which there exists conflict with relevant decisions of the various Circuits is the same as at issue in this case. Does the 6th Amendment jury protections of *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002) apply to that zone between the maximum sentence permitted by the sentencing guidelines for the jury found crime of conviction and the statutory maximum for all enhancements to that crime. The Third Circuit is divided within it's own panels.[5]

This last petition for application of the *Miller-El* standard of "debatable among jurist of reason" places before the Court the typical peevish reception of *Ring v. Arizona* by certain prosecutionally dependent court. In *Ring*, this Court observed:

> ***over the last 12 years accelerating propensity of *** Federal legislatures to adopt sentencing factors: determined by judges that

[5] *United States v. Williams*, 235 F.3d 858, 860, 862-863 (*Apprendi* does not apply to the Sentencing Guidelines); cF. conflicting opinions of Chief Judge Becker which were forerunners to *Ring* in *United States v. Mach*, 229 F.3d 226, 236-239 (3rd Cir. 2000 (warns of "implication for the legitimacy of a variety of sentencing schemes, including the United States Sentencing Guidelines ***" noting "statutory maximum is in tension with methodology applied by Supreme Court in *Apprendi*"); *United States v. Vasquez*, 291 F.3d (3rd Cir. 2001); *United States v. Pressler*, 256 F.3d 144 (3rd Cir. 2001) ("prescribed maximum" is longest sentence "within the jury verdict"); accord *United States v. Strayhorn*, 250 F.3d 462 (6th Cir. 2001) and *United States v. Ramirez*, 242 F.3d 348 (6th Cir. 2001).

> increase punishment beyond what is authorized by the jury verdict *** cause me to believe that our peoples traditional belief in the right of trial by jury is in perilous decline ***" *Ring*, id., Scalia J. concurring at p.3.

Does this reference to "Federal legislatures to adopt sentencing factors" include the U.S. Sentencing Guidelines? Do the opinions of the Court in *Apprendi* and *Ring* exempt the still ongoing practice by many Circuits of non-application of the 6th Amendment to the guideline maximum? This case vividly demonstrates the reality of this issue when compared to the similar system in Washington State in *Blakely*. The guideline maximum sentence "authorized by the jury verdict" is 6 months, i.e., a level 6. The Court alone aggravated this to a sentence of 57 months and 70 months. It stated that these sentences were "within the five year statutory maximum." App. 18a

The Petitioners raised the issue of the constitutionality of the federal legislative regime that permits a sentencing judge alone to increase a jury verdict to such great extent by injecting uncharged pecuniary loss allegations excluded from the indictment and jury. *Ring* deemed unconstitutional that portion of a legislative regime that permitted a trial judge alone to enhance a sentence up to the

statutory maximum of death based on pecuniary facts. A parallel structure exists under the Federal Sentencing Guidelines relative to the fraud crimes. The pecuniary facts similarly determine various ranges or grids of crime and their respective maximum penalties are found by the judge alone.[6] The process of aggravating the jury verdict to the statutory maximum in *Ring* and Blakely is under the identical Federal Sentencing Guidelines. Similarly restitution was unconstitutionally judge fixed on uncharged and unfound losses.[7] This issue is interrelated and consolidated in this matter for judicial expediency and in the interest of justice.

Petitioners before the District and Circuit Courts urged alternatively that: 1) the indictment was jurisdictionally, structurally, defective in view of its failure to charge the element of pecuniary loss. 2) in light of *Ring v. Arizona* the portion of the legislative regime that permits such Judge transformation of jury verdicts is unconstitutional. The prosecution in its Answer made a choice to exercise total silence as to the *Ring* Sixth Amendment violation challenge. As to the jurisdictional challenge the District Court parroted, contrary to *Ring*, that "loss is not a necessary

[6] United States Sentencing Guidelines, Ch. 2 & 3.

element." App. 15a. A generic statutory maximum type argument was made citing a conflicting footnote in *United States v. Cepero* 224 F.3d 256, 268 n5. (3rd Cir. 2000). App. 17a. They also contend that the 6th Amendment does not apply to the Federal Sentencing Guidelines citing the conflicting panel authority of *United States v. Williams* 235 F.3d 858, 862-63, 860 (3d Cir. 2000) App. 16a. cF. *United States v. Knight,* 50 Fed. Appx. 565 (3rd. Cir. 2003). Petitioners submit that this practice has eviscerated the intent of this Court in *Apprendi* and *Ring* in many Circuits. With such a state of difference of opinions among the Circuits petitioners claimed an issue "debatable among jurist of reason." This Court is requested to grant certiorari review in conjunction with *Blakely v. Washington*.

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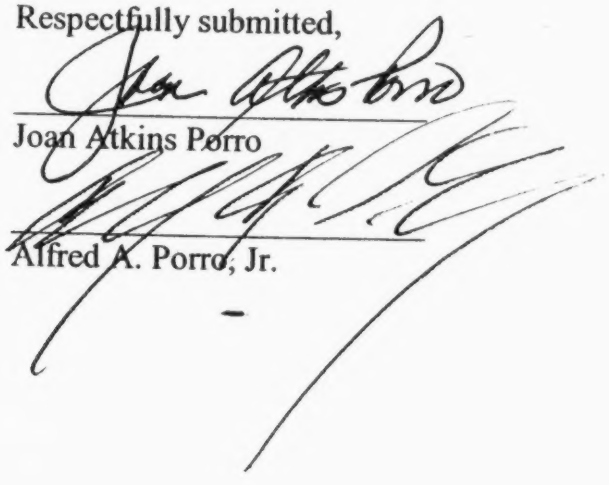
[7] See *United States v. Akrande* 200 F.3d 136 (3rd Cir. 1999) deeming uncharged, unfound loss are wrongfully included in restitution.

CONCLUSION

The petition for a writ of certiorari should be granted. In view of the prosecutional admission adopted by the District and Circuit Courts that the maximum statutory sentence at issue is five (5) years it is requested that interim relief of reduction of Petitioners' 70 month sentence to five (5) years be granted.

Respectfully submitted,



Joan Atkins Porro

Alfred A. Porro, Jr.

APPENDICES

APPENDIX "A"

APPENDIX "A"

APS-209 May 15, 2003

UNITED STATE COURT OF APPEALS FOR THE

THIRD CIRCUIT

C.A. No. 03-1046 & 03-1047 (Consolidated)

JOAN ATKINS PORRO

and

ALFRED A. PORRO, JR.

vs.

UNITED STATE OF AMERICA

(D.N.J. Civ. Nos. 01-cv-03856 &01-cv-03811)

Present: Sloviter, McKee and Smith, Circuit Judges

Submitted are:

(1) Appellants' request for a certificate of appealability under 28 U.S.C. §2253 (c)(1);

(2) Appellants' memorandum of law in support;

(3) Appellants' appendix; and

(4) Appellants' supplemental memorandum of law in support in the above-captioned case.

Respectfully,

Clerk

MMW/CAV/mc/par

ORDER

The foregoing joint request for a certificate of appealability is denied. For essentially the reasons given by the District Court, appellants have failed to make a substantial showing of the denial of a constitutional right. See 28 U.S.C. §2253 (c)(2). The appellants have argued that the District Court failed to fully consider the merits of their claims and that, under Miller-El v. Cockrell, 123 S.Ct. 1029 (2003), this Court should grant them a certificate of appealability. This argument lacks merit. Although the District Court relied heavily on the government's answer, the Porros have not shown that such reliance was improper or that the District Court ignored substantial evidence in support of their claims which demonstrates that its resolution of the claims was debatable or wrong. Id. at 1042.

By the Court,
__(signed)_____
Circuit Judge

Dated: June 24, 2003
par/cc: Ms. JAP
Mr. AAP
GSL ESQ

APPENDIX "B"

APPENDIX "B"

Original Filed
December 6, 2002
William T. Walsh, Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

ALFRED A. PORRO	:	HON. JOSEPH H. RODRIGUEZ
Petitioner	:	Civil Action No. 01-3811
v.	:	
UNITED STATES OF:		
AMERICA	:	
Respondent	:	

JOAN ATKINS PORRO		Civil Action No. 01-3856
Petitioner	:	**OPINION**
v.	:	
UNITED STATE OF	:	
AMERICA	:	
Respondent	:	

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RODRIGUEZ, District Judge

The Petitioners, Alfred A. Porro, Jr. and Joan Atkins Porro, have filed a motion requesting that a Writ of Habeas Corpus issue pursuant to 28 U.S.C. 2255, direction their release from custody or modification of sentence upon the grounds that: (1) In view of the recent United States Supreme Court cases of Cleveland v. United States, Jones v. United States, and Apprendi v. New Jersey, the

indictment was defective and the Court lacked jurisdiction. (2) In the alternative, the sentences imposed upon the petitioners were in violation of the Constitution and laws of the United States; they are disproportionate to the crimes charged and found. (3) The Petitioners allege a violation of the 5th Amendment due process and 6th Amendment right to effective assistance of counsel. (4) Lastly, that Petitioners post incarcerations extraordinary rehabilitation is unique and should result in a sentence reduction or transfer of custody to home detention.[1] Def. Mem. at 1.

The United States opposes the motion and contends that it should be denied in its entirety because Petitioners have failed to meet the standards for such motions under 28 U.S.C. §2255, in that they cannot show cause or prejudice, and because their claims fail on the merits.

BACKGROUND

On December 13, 1996, a federal grand jury sitting in Newark, New Jersey, returned a seventeen count Superseding Indictment against the defendants. Counts 1 through 3 charged both

[1] The Petitioners have filed joint discussion in support of their motion, as a result the Court will respond to both habeas petitions in this Opinion.

defendants with mail fraud in violation of 18 U.S.C§§ 1341 and 2. Count 4 charged both defendants with money laundering, in violation of 18 U.S.C. §§1957(a) and 2. Count 5 charged both defendants with conspiracy to obstruct justice, in violation of 18 U.S.C. §371. Counts 6 though 10 charged Alfred A. Porro, Jr. (hereinafter "A.Porro") with making false statements to Midlantic Bank in connection with a line of credit, in violation of 18 U.S.C. §§ 1014 and 2. Counts 11 and 12 charged A. Porro with making false statements to Midlantic Bank in connection with Dineco, Inc., in violation of 18 U.S.C. §§ 1-14 and 2. Counts 13 and 14 charged A. Porro with making false statements to National Community Bank in connection with Riverview Associates, in violation of 18 U.S.C. §§ 1014 and 2. Count 15 charged Joan Atkins Porro (hereinafter "J. Porro:) with tax evasion for her 1989 tax return, in violation of 26 U.S.C. §7201 and 18 U.S.C. §2. Counts 16 through 18 charged both defendants with false subscription on their personal tax returns in violation of 26 U.S.C. §7206(1). Count 19 charged J. Porro with false subscription on the 1990 partnership return filed for Porro & Porro, the law firm of the Petitioners.

On March 18, 1999, a federal jury found the defendants guilty on all counts. The Court sentenced A. Porro to 70 months imprisonment on Counts 4, 6-14 and 60 months imprisonment on Counts 1, 2, 3, 5, 16-18, to run concurrently; restitution of $333,661 in the amounts of $25,000 to Mary Galofaro, $100,000 to Margaret Helstoski, and $208,661 to the Bank of New York and a special assessment of $850 was also ordered. The Court sentenced J. Porro to 57 months imprisonment on Counts 1-5, 15-19, to run concurrently, restitution of $125,000 in the amounts of $25,000 to Mary Galofaro and $100,000 to Margaret Helstoski; and a special assessment of $500 was also ordered.

Defendants appealed, challenging their convictions and sentences. The Court of Appeals for the Third Circuit denied their appeal on June 1, 2000. Defendants petitioned for a writ of certiorari, which was denied by the Supreme Court on February 21, 2001. Porro, et al. v. United States. As a result, defendants' judgments of conviction became final for purposes of §2255 motion. See Karpral v. United States, 166 F.3d 565, 577 (3d Cir. 1999) (a "judgment of conviction becomes 'final' within the meaning of

§2255 on . . . the date on which the Supreme Court . . . denies the defendant's timely filed petition for certiorari").

On August 17, 2001, Petitions filed the instant pro se petitions and supplemented their petitions on January 7, 2002 and with a document entitled "Trilogy of the 6th Amendment Era" which referenced the case of Ring v. Arizona, 122 S.Ct. 2428 (2002) decided by the United States Supreme Court on June 24, 2002. For the reasons stated herein the petitions will be denied in their entirety.

Standards for Section 2255 Relief

Section 2255 of Title 28, United States Code, provides that a prisoner in custody under sentence of a federal court may move the court which imposed the sentence to vacate, correct, or set aside a sentence, on the grounds that:

> the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attach . . .

28 U.S.C. §2255. The Court has jurisdiction under 28 U.S.C. §1331. Petitioners have the burden of establishing any claim asserted in their petition. United States v. Abbott, 975 F. Supp. 703, 705 (E.D. Pa. 1997).

The grounds for collateral attacks on final judgments are narrowly limited. United States v. Addonizio, 442 U.S. 178, 184 (1979). "[A]n error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." Id. Habeas Corpus – available to federal prisoners in the jurisdiction of the sentencing court through 28 U.S.C. §2255 – encompasses claims of lack of jurisdiction or constitutional error. Addonizio, 442 U.S. at 185. An error of law is otherwise subject to collateral attack only if it "constitutes a fundamental defect which inherently results in a complete miscarriage of justice." Id., quoting Hill v. United States, 368 U.S. 424, 428 (1962). Similarly, errors of fact are subject to collateral attack only "in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." Id. at 186 quoting United States v. Mayer, 235 U.S. 55, 69 (1914).

Because there is a "basic distinction between direct review and collateral review." id. at 184, there are some procedural as well as substantive limitations upon the availability of collateral review. The doctrine of res judicata is inapplicable in section 2255 proceedings. Sanders v. United States, 373 U.S. 1, 8 (1963). However, "section 2255 may not be employed to relitigate questions which were raised and considered on direct appeal." Barton v. United States, 791 F.2d 265, 267 (2d Cir. 1986) (per curiam).

Claims that were not made at the time of trial or on direct appeal may be waived. In United States v. Frady, 456 U.S. 152 (1982), the Supreme Court held that when a defendant has failed to object at trial and then failed to raise the issue on direct appeal, "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." Id. at 166. "Because it was intended for use on direct appeal ... the 'plain error' standard is out of place when a prisoner launches a direct attached a criminal conviction after society's legitimate interest in the finality of the judgment has been perfected by the conviction of appeal." Id. at 164. "Once the defendant's chance to appeal has been waived or

exhausted," the courts "are entitled to presume he stands fairly and finally convicted. . . " Id.

Accordingly, a habeas petitioner can obtain collateral review only if he can show that he can meet the "cause and actual prejudice" standard. Id. at 164-66. Under this standard, "to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) 'cause' excusing his double procedural default, and (2) 'actual prejudice' resulting from the errors of which he complains." Id. at 167-68. Where a defendant fails to show such cause and actual prejudice, he cannot obtain collateral review. Felix v. Virgin Islands, 702 F.2d 54, 57 (3d Cir. 1983).

The requirement that cause and actual prejudice be shown "is the general rule in habeas proceedings." United States v. Baynes, 687 F.2d 659, 669 n.12 (3d Cir. 1982). An exception applies when a claim of ineffective assistance is raised for the first time in a section 2255 proceedings; a defendant cannot be expected to raise this type of claim at trial, and most ineffective assistance claims are not properly determined on direct appeal. Brien v. United States, 695 F.2d 10, 13-14 (1st Cir. 1982).

The Mail Fraud Convictions Were Valid

Petitioners contend that the district court was without jurisdiction in light of recent United States Supreme Court decisions of Cleveland v. United States and Apprendi v. New Jersey. The Petitions essentially argue that there was insufficient evidence to support the mail fraud counts, a claim that was rejected by the Third Circuit. Now, however, they argue that the court was "without jurisdiction" to decide the mail fraud counts. Def. Mem. at 18. Their argument appears to claim that the Government improperly transformed a state law charge of theft into a federal crime by alleging violations of the mail fraud statute, 18 U.S.C. §1344.

However, the argument that the mail fraud convictions should be reversed was rejected by the Third Circuit. The Court of Appeals' held "[o]our review is limited to determining whether the trial record contains sufficient evidence to support their conviction on the mail fraud counts . . . In sort, we find sufficient evidence in the record to support the Porros' conviction on the three mail-fraud counts charged in the second superseding indictment. We also find the Porros' challenge to the jury instructions on the mail fraud counts to be without merit." Slip op. at 11.

To support their current allegation that the Court was without jurisdiction, the Petitioners principally rely upon Cleveland v. United States, 531 U.S. 12 (2000). They argue that the holding of Cleveland dictates that the mail fraud counts are jurisdictionally defective because they do not allege a "federal" crime. This argument is without merit, and to adopt the phrase of the Third Circuit, is "unworthy of a lengthy discussion." Slip op. at 10. In Cleveland, the sole question presented was whether section 1341, the mail fraud statute reaches false statements made in an application for a state license. 531 U.S. at 15. The court held that section 1341 did not reach fraud in obtaining a video poker license because such license was not "property" within the meaning of section 1341. Id. at 20-25. That is not the case here.

Here, money, which was a issue, clearly falls within the meaning of section 1341. The statute employs the use of that very word. 18 U.S.C. §1341 Frauds and swindles, provides:

> §1341. Frauds and swindles
>
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false

or fraudulent pretenses, representations, or promises . . . (emphasis added).

The mail fraud counts here were based on a series of acts that the Petitioners committed over a five year period. When their business ventures began to fail, defendant J.Porro wrote checks from the Galofaro trust accounts payable to the failure business ventures. In annual accountings mailed to the trust beneficiaries' guardian in 1992, 1993, and 1994, J. Porro failed to reveal that the money had been withdrawn from the trust accounts, and falsely reported that previous withdrawals were earning investment interest. As a consequence, the guardian paid income tax on the phantom interest earnings each year. This clearly was a violation of the mail fraud statute. As the Court of Appeals held: "the indictment charged the defendants with a single, on-going scheme in which the mailings in question played an integral, if later, part . . . Thus, the mere fact that the accounting materials at issue in this case were mailed after the Porros had already misappropriated trust fund money does not mean that those mailings cannot support their conviction for mail fraud." Slip op. at 9. The Court of Appeals found that the evidence established that money had been misappropriated ad that the

mailings charged played an integral part. Accordingly, the holding of Cleveland is inapposite.

The Petitioners also contend that the Government improperly argued that the defendants had a duty to disclose to the beneficiaries. This contention is unsupported by the record, and was an argument rejected by the Third Circuit. As the Court of Appeals held:

> the Porros also argue that the District Court erroneously instructed the jury that Joan Porro had a duty to disclose material facts to the relevant trust beneficiaries and their guardian. The District Court did not so instruct the jury, however. Rather the court left it to the jury to decide whether Joan Porro had a duty to disclose and, if so, whether she violated that duty.

Slip op. at 10.

Finally, the Petitioners argue that the failure to charge the loss element in the indictment is fatal to jurisdiction. Def. Mem. at 31. This argument was also raised on appeal and rejected. The law is clear in this circuit that loss is not a necessary element of the mail

fraud statute. See, e.g., United States v. Copple, 24 F.3d 535, 544 (3d Cir. 1994); United States v. Sokolow, 91 F.3d 396, 406 (3d Cir. 1996).

The Petitioners then turn their argument into an Apprendi-type claim, contending that their sentences on the mail fraud counts violated the Supreme Court's holding in Apprendit v. New Jersey, 530 U.S. 466 (2000), because "loss amount historically is an essential aggravating element in theft cases and now in the Federal Sentencing Guidelines." Def. Mem. at 35. Petitioners misread the ruling of Apprendi. The Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (emphasis added.) Apprendi, 530 U.S. at 490. The Third Circuit has held, Apprendi does not apply to the increase in [a defendant's] sentence under the Sentencing Guidelines." United States v. Williams, 235 F.3d 858 (3d Cir. 2000). By definition, the Sentencing Guidelines cannot increase a defendant's statutory maximum sentence, see U.S.S.G. §5G1.1(a) & (c)(1), but instead govern only the sentencing court's exercise of discretion within that maximum. Id. at 862, citing Apprendi, 120 S.Ct. at 2358,

2366 n.21 and Edwards v. United States, 523 U.S. 511, 515 (1998). Accordingly, as the Third Circuit has observed en banc, 523 U.S. 511, 515 (1998). Accordingly, as the Third Circuit has observed en banc, "because application of the Sentencing Guidelines does not implicate a fact that would increase the penalty of a crime beyond the statutory maximum, the teachings of Apprendi . . . are not relevant." United States v. Cepero, 224 F.3d 256, 268 n.5 (3d Cir. 2000) (en banc).

In addition, Judge Becker set forth a two-step Apprendi inquiry in United States v. Mack, 229 F.3d 256, 268 n.5 (3d Cir. 2000) (en banc).

In addition, Judge Becker set forth a two-step Apprendi inquiry in United States v. Mack, 229 F.3d 226 (3d Cir. 2000).

> A court must first determine the "prescribed statutory maximum" sentence for the crime of which the defendant was convicted and assess whether the defendant's ultimate sentence exceeded it. If it did, the court must consider the second-order Apprendi question: whether the enhanced sentence was based on "the fact of

a prior conviction." If it was, then the sentence is constitutional. If it was not, then the sentence is unconstitutional.

229 F.3d at 237.

See also United States v. Henry, 282 F.3d 242 (3d Cir. 2002); United States v. Weaver, 267 F.3d 231 (3d Cir. Sept. 21, 2001). Here, the loss did not result in a sentence beyond the maximum statutory penalty. Each of the defendants was sentenced within the five-year statutory maximum provided for in the statute. As such, this claim fails.

Finally, Petitioners argue that the Court violated the principle set forth in Apprendi because it improperly transformed their sentences from a level 6 under the Sentencing Guidelines to levels 25 or 27. This claim is also without merit. As stated above, the Court of Appeals for the Third Circuit has held, "Apprendi does not apply to the increase in (a defendant's) sentence under the sentencing Guidelines." United States v. Williams, 235 F.3d171, 180 (3d Cir. 2001). This is true because by definition, the Sentencing Guidelines cannot increase a defendant's statutory maximum sentence, but instead govern only the sentencing court's

exercise of discretion within that maximum. Williams, 235 F.3d at 862.

Thus, the Petitioners' argument, that Apprendi was violated because the sentence was based on losses not charged in the indictment is without merit. Here, defendant A. Porro was sentenced to sixty months (5 years) imprisonment on Counts 1 through 3, the mail fraud counts, to run concurrently. J. Porro was sentenced to 57 months imprisonment (three months short of five years) on Counts 1 through 3 to run concurrently. Accordingly, no sentence exceeded the statutory maximum of five years imprisonment. Accordingly, there was no violation under the Apprendi ruling.

Finally, the Petitioners in Point I of their brief, challenge the order of restitution. Here, the Court is without jurisdiction to hear this claim. "It is fundamental that an individual must be 'in custody' in order to be eligible for habeas corpus relief." Pringle v. Court of Common Pleas, 744 F.2d 297, 300 (3d Cir. 1984). Courts which have considered the issue as to whether the imposition of a monetary fine or restitution constitutes a sufficient restraint in liberty in order to satisfy the "in custody" requirement have held that it does not. See e.g. United States v. Barnickel, 113 F.3d 704, 706 (3d Cir.

1997); United States v. Daudet, 81 F.3d 585, 592 (5th Cir. 1996); United States v. Michaud, 901 F.2d 5, 7 (1st Cir. 1990); United States v. Marron, 1996 WL 577511, *1 (E.D. Pa. 1996). Simply put, section 2255 is a devise to contest the lawfulness of custody; if resolution of the motion in the petitioner's favor will not affect the plaintiff's custody, the court lacks subject matter jurisdiction to consider the motion. Marron, at *3.

Alternatively, the Petitioners challenge to the order of restitution does not rise to the level of a constitutional violation. See, e.g. Barnickel, 113 F.3d at 705-06 ("Barnickel's argument that the district court swept too much conduct into its calculation was something she could have raised on direct appeal, but it does not rise to the level of a constitutional violation.") nor does it meet the standard of a "fundamental defect which inherently results in a complete miscarriage of justice." Id. As a result, Petitioners' challenge to the restitution order will be dismissed.

II.

Petitioners' Claim for Relief Based upon Ineffective Assistant of Counsel

In Point II of their brief, the Petitioners, without specifics, argue that their professional performance in this case was substandard to the point of depriving them of their 5th and 6th Amendment rights. The Petitioners claim that they should now benefit from their alleged incompetence – when they chose to represent themselves in the face of repeated warnings from this Court – is not persuasive

On January 3, 1997, both Petitioners appeared before the Court. Alfred A. Porro advised the Court that he intended to waive his right to counsel and proceed pro se. The court permitted such self-representation only after an extensive colloquy wherein the Petitioner acknowledged that he understood the charges and the perils of self-representation but demanded to proceed pro se anyway.

Petitioner Joan Atkins Porro retained Rocco Cipparone, Esquire, who represented her during most of the pretrial proceedings. On September 22, 1997, after resolving most of the pretrial issues, the court permitted Mr. Cipparone to withdraw from the case based upon his client's refusal to consult with him and prepare for trial. Michael Querques, Esquire, represented the

petitioner Joan Atkins Porro for the remainder of the suppression hearing and at the sentencing.

After the suppression motions were denied, the petitioner Joan Atkins Porro advised the Court of her intention to proceed to trial pro se. On November 13, 1997, after an extensive colloquy, the Court granted the petitioner's require to represent herself and she did so despite sound advice to the contrary from this Court. At not time during the colloquy or any other proceeding below did Joan Atkins Porro ever request that her codefendant, Alfred A. Porro, represent her or did she ever indicate that she was relying on him. To the contrary, the petitioner Joan Atkins Porro was advised throughout the trial, and the jury was instructed that the Petitioners were representing themselves. Further, as the record reveals, Joan Atkins Porro mounted a vigorous defense on her own behalf, arguing motions, participating in jury selection and the charge conference. She delivered an opening statement, presented evidence, cross examined witnesses and gave an effective closing argument to the jury.

Thus, since the Petitioners chose to represent themselves, they cannot turn that tactical decision into a free pass to avoid

responsibility for the conduct. As the Supreme Court noted in Faretta v. California, 422 U.S. 806, 834 n.46 (1975), "[t]he right to self-representation is not a license to abuse the dignity of the courtroom. Neither is it a license not to comply with relevant rules of procedural and substantive law. Thus, whatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel.'" See also United States v. Welty, 674 F.2d 185 (3d Cir. 1982). Here, Petitioners chose to represent themselves and now must live with the consequences.

The only states of the proceedings during which the petitioner Joan Atkins Porro did not represent herself was the suppression hearing and the sentencing. In order to establish a viable claim of ineffective assistance of counsel, a petitioner must show that "(1) counsel's representation fell below an objective standard of 'reasonableness under prevailing professional norms;' and (2) the petitioner suffered prejudice as a result – that is, there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different." Sistrunk v.

Vaughn, 96 F.3d 666, 670 (3d Cir. 1996) (quoting Strickland v. Washington, 466 U.S. 668, 694 (1984)).

As to the suppression hearing, the Petitioners cite to no specific argument or claim made on their behalf by Mr. Querques that reflected deficient performance which caused them any prejudice. All of the claims raised by the Petitioners were specifically considered and rejected by this Court. As well as the Third Circuit and the Supreme Court. Because they have offered no new arguments that could have been raised, they cannot now relitigate old issues. See United States v. DeRewal, 10 F.3d 100, 105 n.4 (3d Cir. 1993) (section 2255 cannot be used to relitigate matter already raised to, and decided by, appellate court), cert. denied, 114 S. Ct. 1544 (1994).

The petitioner Joan Atkins Porro's broad claim that she was prejudiced by Mr. Querques' deficient representation at sentencing suffers from the same deficiency. On direct appeal, the petitioners raised many claims attacking their sentences. The Third Circuit rejected each of the six different challenges. United States v. Porro, App. No. 99-5369, Op. at pp. 26-28.

The petitioner Joan Atkins Porro raises only one arguably specific claim that was not raised by Mr. Querques. At page three, paragraph eight of the Querques affidavit, he claims that he was not aware of the Apprendi decision at the time Joan Atkins Porro was sentenced. However, he declines to articulate what argument he would have made had he been aware of the decision or how he things it could have changed the sentence the petitioner received.

III.

Post-Offense Rehabilitation is not a Cognizable Claim

Finally, Petitioners contend that they are entitled to relief under section 2255because of their extraordinary post-conviction rehabilitation. They state that they are "converted disciples" and set forth examples of their rehabilitative conduct since their convictions.

Even assuming that the Petitioners have been rehabilitated, such claim is not cognizable in a section 2255 proceeding. See, e.g., United States v. Rudolph, 190 F.3d 720, 727 (6th Cir. 1999) ("[P]ost-sentence rehabilitation [does not] provide a basis for relief under §2255, because such rehabilitation does not constitute ground for collateral attach on a defendant's sentence."); United States v. Chen, 2000 WL 1831540, *2 (N.D. Ill. 2000) (rehabilitation is not grounds

for relief under §2255). See also United States v. Cook, 130 F. Supp. 43, 47 (D.C. 2000) (court has discretion to consider post-conviction rehabilitation at re-sentencing).

Accordingly, because the claims of post-offense rehabilitation – even assuming they are valid – are not cognizable in this proceeding, the request for relief will be denied.

Conclusion

For all of the foregoing reasons, the petitions under 28 U.S.C. §2255 filed by the Petitioners Alfred A. Porro, Jr. and Joan Atkins Porro are denied.

An appropriate Order will be entered.

__s/Joseph H. Rodriguez__
JOSEPH H. RODRIGUEZ
U.S.D.J.

Dated: December 4th, 2002

ENTERED ON
THE DOCKET
Dec 6 2002
William T. Walsh, Clerk
By: Ellen M. _____
(Deputy Clerk)

APPENDIX "C"

APPENDIX "C"

ORIGINAL FILED
Feb 3 2003

_____		UNITED STATE DISTRICT COURT
ALFRED A. PORRO	:	DISTRICT OF NEW JERSEY
Petitioner	:	Hon. Joseph H. Rodriguez
v.	:	Civil Action No. 01-3811
UNITED STATES OF	:	ORDER
AMERICA	:	
Respondent	:	

WHEREAS, this Court denied Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. §2255; and

WHEREAS, this matter was appealed to the Third Circuit Court of Appeals by the Petitioner and remanded for the sole issue of considering whether a certificate of appealability should issue; and

WHEREAS, this Court may issue a certificate of appealability pursuant to 28 U.S.C. §2253 only where Petitioner has made a substantial showing that he has been denied a Constitutional right; and

WHEREAS, in both this Court's December 6, 2002 opinion and a previous opinion of the Third Circuit, United States v. Porro,

No. 99-5369 (3d Cir. June 1, 2000), the Petitioner's constitutional claims have been adjudged to be devoid of merit;

IT IS HEREBY ORDERED this 3rd day of February, 2003 that a Certificate of Appealability WILL NOT ISSUE.

__s/Joseph H. Rodriguez__
JOSEPH H. RODRIGUEZ
U.S.D.J.

reference: Document [14]

ENTERED ON
THE DOCKET
Feb 3 2003
William T. Walsh, Clerk
by: _E.M. Kea ___
(Deputy Clerk)

APPENDIX "D"

APPENDIX "D"

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 03-1046 & 03-1047

USA v. Porro

To: Clerk

1) Motion by Pro Se Appellants for Leave to File a Joint Application for a Certificate of Appealability, Construed as Motion to Consolidate the Actions at Nos. 03-1046 and 03-1047, and for Leave to File Memorandum of Law in Support of Application for Certificate of Appealability in Excess of 20 Pages

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The foregoing Motion is granted with filing of the Application, Memorandum in Support, and Appendix as of the date of this Order. The actions are hereby consolidated for all purposes, including briefing and disposition on the merits should the Court grant a certificate of appealability.

For the Court,

_____

Marcia M. Waldron
Clerk

Dated: Mar 11 2003

par/cc: J.A.P.

A.A.P.

G.S.L., Esq.

APPENDIX "E"

APPENDIX "E"

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

03-1047

Alfred A. Porro

v.

United States

PRESENT: SLOVITER, MCKEE AND SMITH,

Circuit Judges

SUR PETITION FOR PANEL REHEARING

The petition for panel rehearing filed by Appellant having been submitted to the judges who participated in the decision of this Court, and no judge who concurred in the decision having asked for panel rehearing, the petition for panel rehearing is hereby DENIED.

BY THE COURT:

__signed by Judge__

Circuit Judge

DATED: Sept 30, 2003

par/cc:

Mr. A.A.P. Jr.

G.S.C. Esq.